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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,

Petitioners,

v.

ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Police Personnel Department; STATE OF INDIANA; and, INDIANA STATE POLICE DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the narrowed test for due process created by the Seventh Circuit Court of Appeals in this case, which test limits judicial review of federal retrospective legislation to an examination of Congressional purpose, and which avoids review of the actual harsh and oppressive effect of the retrospective legislation upon citizens' property rights, is an incorrect interpretation of *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), erroneously answers the question expressly left open therein, and conflicts with this Court's precedent and other Circuits' interpretation of *R.A. Gray*. The result is ambiguity and uncertainty as to due process analysis, and as to this Court's intended meaning of *R.A. Gray*.

II. Whether section 2(c)(1) of The Fair Labor Standards Amendments of 1985, which retrospectively takes away overtime compensation previously earned by the Plaintiffs, violates the Due Process Clause where Plaintiffs reasonably relied upon clear existing law requiring compensation for overtime worked, and consequently elected to work additional hours on the basis of such incentive.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above- entitled proceeding on February 4, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 839 F.2d 387, and is reprinted in the Appendix at A-1.

The decision of the United States District Court for the Southern District of Indiana, Indianapolis Division, is

reported at 657 F.Supp. 1113, and is reprinted in the Appendix at A-13.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 4, 1988. A timely-filed Petition for Rehearing was denied on March 8, 1988. This Petition is timely-filed within ninety (90) days of such date. The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment 5:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150 § 2(c)(1), 99 Stat. 788, 29 U.S.C.S. § 216 note (Law. Co-op. Supp. 1987) (History; Other Provisions) (hereinafter, the "Retrospective Amendment"):

> No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Codes of Federal Regulations.

STATEMENT UNDER RULE 28.4(b)

This proceeding draws into question the constitutionality of the Retrospective Amendment, and neither the United States nor any agency, officer, or employee thereof is a party. It is

noted that 28 U.S.C. § 2403 may be applicable. Both the District Court and the Court of Appeals have certified this proceeding to the Attorney General of the United States.

STATEMENT OF THE CASE

As of February 19, 1985, the date of this Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (hereinafter, the "FLSA"), was effective to require the states to pay overtime compensation to their employees. In reliance upon their FLSA rights to overtime compensation, the members of the Plaintiff class of 520 Indiana State Police Officers[1] began voluntarily electing to work additional hours constituting FLSA overtime for the Defendant Indiana State Police Department.[2] (App. A-21-22).

Defendants, however, delayed paying the overtime compensation undisputably due to the Plaintiffs. (App. A-22-23). Defendants did not question the right to overtime compensation—they merely delayed payment thereof. (App. A-22-23). Plaintiffs ultimately filed suit for such compensation on October 15, 1985, in the U.S. District Court for the Southern District of Indiana, Indianapolis Division. The jurisdiction of the District Court was invoked under Section 16(b) of the FLSA, 29 U.S.C. § 216(b), and the general jurisdictional grant under 28 U.S.C. § 1337(a). On October 17, 1985, the Defendants again reinforced the belief that the compensation was forthcoming and that computer programs were being written to implement payment. (App. A-23).

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[1] The class consists of those officers who affirmatively filed consents to the lawsuit, pursuant to 29 U.S.C. § 216(b).

[2] As discussed *infra* at 11, n.6, Defendants may attempt to create a factual dispute on this issue. The portion of the Record included in the Appendix hereto establishes the facts as stated by Petitioners.

On November 13, 1985, approximately one month after the lawsuit was filed, and after the Plaintiffs had worked nine months of overtime in reliance upon FLSA compensation rights, Congress retroactively eliminated such FLSA compensation rights. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150 § 2(c)(1), 99 Stat. 788, 29 U.S.C.S. § 216 note (Law. Co-op. Supp. 1987) (History; Other Provisions).

Motions for Summary Judgment on the issue of the constitutionality of the Retrospective Amendment under the due process clause of the fifth amendment to the United States Constitution (hereinafter, the "Due Process Clause"), insofar as it took away compensation earned prior to enactment, were filed by both Plaintiffs and Defendants. Plaintiffs duly notified the Clerk of the constitutional attack upon an Act of Congress, pursuant to 28 U.S.C. § 2403 (App. A-17). The Clerk certified the case to the U. S. Attorney General on February 28,1986. (App. A-19). On April 7, 1987, the District Court found in favor of the constitutionality of the Retrospective Amendment, and entered summary judgment for the Defendants. *Rhinebarger v. Orr*, 657 F.Supp. 1113 (S.D. Ind. 1987) (App. A-13). Plaintiffs timely filed an appeal to the Court of Appeals for the Seventh Circuit (hereinafter, the "Seventh Circuit"), which, on February 4, 1988, affirmed the judgment and decision of the District Court, *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988) (App. A-2), invoking appellate jurisdiction under 28 U.S.C. § 1291. On February 17, 1988, the Plaintiffs timely filed a Petition for Rehearing, which was denied on March 8, 1988 (App. A-10).

The Seventh Circuit declined to follow its own precedent, *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983), but instead adopted a new and narrow construction of this Court's decision in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The Seventh Circuit concluded that an actual "harsh and oppressive" effect of retrospective legislation is irrelevant if the legislation is supported by a rational Congressional purpose.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE NARROWED DUE PROCESS ANALYSIS ADOPTED BY THE SEVENTH CIRCUIT IN THIS CASE, WHICH PROVIDES NO JUDICIAL REVIEW OF THE ACTUAL HARSH AND OPPRESSIVE EFFECT OF FEDERAL RETROSPECTIVE LEGISLATION UPON CITIZENS' PROPERTY RIGHTS, IS AN INCORRECT INTERPRETATION OF *R.A. GRAY*, CONFLICTS WITH THE TEST SET FORTH BY THIS COURT, AND ELIMINATES ANY MEANINGFUL DUE PROCESS LIMITATIONS UPON RETROSPECTIVE LEGISLATION. A HARSH AND OPPRESSIVE EFFECT, ALTHOUGH RELEVANT IN OTHER CIRCUITS, IS IRRELEVANT IN THE SEVENTH CIRCUIT.

The Seventh Circuit's decision forecloses any judicial review under the Due Process Clause of the actual *effect* of retrospective legislation upon citizens' property rights, because the decision tests for a "harsh and oppressive" effect of the legislation by examining only the rationality of Congressional *intent*: ". . . [L]aws are 'harsh and oppressive' in a constitutional sense only when Congress enacts them with an irrational or arbitrary purpose." (Opinion below, App. A-7). The Seventh Circuit purportedly relied upon the decision in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984), which followed *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in adopting this analysis.

Plaintiffs submit that such an interpretation of the *R.A. Gray* and *Turner Elkhorn Mining* decisions is constitutionally impermissible because the resulting test for due process will fail to consider a possible harsh and oppressive effect of federal legislation. The correct interpretation of the language of *R.A. Gray* and *Turner Elkhorn Mining*, which interpretation is consistent with prior precedent of both this Court and the First, Second, Third and Sixth Circuits, as well as the Seventh Circuit itself, is to examine the "harsh and oppressive" effect *as*

an element of the required determination of whether the legislation is arbitrary or irrational, *i.e.*, if the legislation has a "harsh and oppressive" effect, then the legislation is arbitrary or irrational.

The Seventh Circuit's decision adopts an inconsistent interpretation of *R.A. Gray*, *i.e.*, if the legislation is supported by a nonarbitrary and rational Congressional purpose, then by definition it does not have a "harsh and oppressive" effect.[3] Such a narrow examination would allow federal legislation to survive a due process challenge even if the effect of the legislation were admittedly harsh and oppressive upon citizens' rights. The consequences of this interpretation are extreme.

If the narrowed due process analysis adopted in this case is correct, the prior warning presented in *Nachman v. Pension Benefit Guar. Corp.*, 592 F.2d 947, 960, n.26 (7th Cir. 1979), *aff'd on stat. grounds*, 446 U.S. 359 (1980), that a failure to examine the effect of legislation upon citizens' property rights "might ultimately result in no meaningful scrutiny of the legislative process—a result prohibited by the Due Process Clause", will have come to fruition.[4] The actual *effect* upon citizens' property rights is rendered completely irrelevant under the Seventh Circuit's analysis.[5] As such, the decision conflicts directly with this Court's decisions in *Usery v. Turner Elkhorn*

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[3] Plaintiffs question the logic of this interpretation. If correct, the terms "harsh and oppressive" are rendered meaningless, as the due process inquiry would stop after an examination of Congressional purpose.

[4] The legislative history of the Retrospective Amendment provides no evidence of any Congressional concern for the constitutionality of the amendment.

[5] As discussed at Section II, *infra*, Plaintiffs' sole challenge to the constitutionality of the Retrospective Amendment is the harsh taking from them of the compensation they earned for the overtime they had previously elected to work in reliance upon their rights to such compensation. This harsh effect is ignored in the decision below. This case presents a perfect example of how an unquestionably harsh exercise of Congressional power could nevertheless pass constitutional muster if the Seventh Circuit's narrowed analysis is allowed to stand.

Mining Co., 428 U.S. 1 (1976), and *Welch v. Henry*, 305 U.S. 134 (1938), and incorrectly interprets *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). This interpretation conflicts with that of other Circuits, as discussed *infra* at 10, as well as the Seventh Circuit's own prior decision in *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983).

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court upheld a retrospective statute which imposed liability upon coal mine owners for former coal mine workers now suffering from black lung disease: "[T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers." *Id.* at 18. In reaching this conclusion, this Court emphasized that judicial review must include an examination of the possible effect of retrospective legislation upon the reliance interests of the citizens:

> [T]he justification for the retrospective imposition of liability *must* take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis.

Id. at 17 (emphasis added). This Court then noted that the upsetting of a citizen's reliance upon existing law, which reliance resulted in a given course of conduct, had previously been utilized as a significant factor in determining rationality, citing *Welch v. Henry*. *Id.* at 17, n.16.

In *Welch v. Henry*, 305 U.S. 134 (1938), a retrospective imposition of a tax upon a corporate dividend was held constitutional because the citizens affected did not change their behavior in reliance upon existing law, *i.e.*, they would not have declined the dividend merely because of the resulting tax. *Id.* at 147-48. This Court in *Welch* distinguished prior cases which had held unconstitutional the retrospective taxation upon

gifts, because in those cases the taxpayer may have voluntarily refrained from giving had he known of the tax:

> Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer . . . . In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its *retroactive application is so harsh and oppressive* as to transgress the constitutional limitation.

Id. at 147 (emphasis added). In contrast, the Seventh Circuit's narrowed analysis would prevent any examination of the taxpayer's voluntary acts.

The case of *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), is the most recent and perhaps the most significant expression by this Court of the proper due process analysis of federal retrospective legislation, and expressly left an important question open, which is now presented by this case. Unfortunately, the Seventh Circuit's interpretation of one sentence from the *R.A. Gray* decision formed the foundation for the adoption of a narrowed due process inquiry. In *R.A. Gray*, this Court indicated approval of the *Welch v. Henry* "harsh and oppressive" test which emphasized for purposes of due process the voluntary acts of the citizens affected in reliance upon existing law. *Id.* at 733. The *R.A. Gray* Court then provided the following sentence which the Seventh Circuit incorrectly interpreted: "[T]hat standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*." *Id.*

Plaintiffs submit that the correct interpretation of this sentence, in light of the reference to *Turner Elkhorn Mining*, is that a "harsh and oppressive" effect of retrospective legislation

is to be utilized as a test for determining the rationality of such legislation, *not* that the mere rationality of Congressional purpose determines the lack of a harsh and oppressive effect, and terminates the inquiry (as the Seventh Circuit below held). Plaintiffs' interpretation is reinforced by the following footnote from *R.A. Gray* which suggested that a four factor analysis stressing the effect upon reliance interests, previously enunciated by the Seventh Circuit in *Nachman*, 592 F.2d 947, may assist *the determination of rationality* but does not constitute the actual test for due process:

> We therefore reject the constitutional underpinnings of the analysis employed by the Court of Appeals in *Nachman*, although we have no occasion to consider whether the factors mentioned by that court might in some circumstances be relevant in determining whether retroactive legislation is rational.

467 U.S. at 727, n.6. This open question concerning the usefulness of the *Nachman* factors is directly presented by the facts of this case. The Ninth Circuit also has noted potential usefulness of the *Nachman* reliance factors in determining rationality. *Board of Trustees v. Thompson Building Materials*, 749 F.2d 1396, 1405 n.5 (9th Cir. 1984). The Seventh Circuit itself stated in *Nachman* that the four factors, including the reliance interests of the parties, assisted the determination of rationality:

> It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, they must only be used to determine whether the legislation represents a rational means to a legitimate end. *See Turner Elkhorn Mining*, 428 U.S. at 18-19, 96 S.Ct. 2882.

592 F.2d at 960.

This Court should grant certiorari in this case to answer the question being debated among the Circuits as to the relevance of the *Nachman* factors in such a case. This Court was not presented with an opportunity to resolve the confusion in *R.A. Gray*, but is presented with such an opportunity here.

The Second Circuit in *Canisius College v. United States*, 799 F.2d 18, 25 (2nd Cir. 1986), stated that: "Among the factors to be considered in an assessment of whether a retroactive statute is harsh and oppressive in application is whether it abrogates vested rights." *See also Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2nd Cir. 1985); *New England Baptist Hosp. v. United States*, 807 F.2d 280, 284-85 (1st Cir. 1986); *Temple Univ. v. United States*, 769 F.2d 126, 134-35 (3d Cir. 1985); and, *North American Coal Corp. v. Campbell*, 748 F.2d 1124, 1128 (6th Cir. 1984). The Seventh Circuit in *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983), previously applied the exact analysis which Plaintiffs are now urging:

> Thus we must apply the *Turner Elkhorn Mining* rationality test to this aspect of the MPPAA, with particular attention to whether the imposition of liability during the retrospective period is so "harsh and oppressive" that the retrospective application of the statute must be declared unconstitutional.

Id. at 1269. The Seventh Circuit's significant retreat in our case from its well-reasoned analysis in *Peick* is confusing and unjustified. The lack of a specific overruling of *Peick* results in ambiguity within the Seventh Circuit itself.

The Seventh Circuit's new interpretation of this Court's decision in *R.A. Gray* is erroneous, and resulted in the failure of the court to examine the harsh and oppressive effect of the Retrospective Amendment upon Plaintiffs, and the consequent breach of due process guarantees. In practicality, such a circumscribed analysis will eliminate any level of constitutional protection against federal retrospective legislation. The Plaintiffs, Indiana State Police Officers, have certainly been afforded no such protections.

II. THE RETROSPECTIVE AMENDMENT HAS A HARSH AND OPPRESSIVE EFFECT, AND IS THUS VIOLATIVE OF DUE PROCESS, BECAUSE IT ABROGATES REASONABLE RELIANCE INTERESTS BY TAKING AWAY FROM PLAINTIFFS THE COMPENSATION THEY HAD PREVIOUSLY EARNED FOR ADDITIONAL HOURS VOLUNTARILY WORKED IN RELIANCE UPON THE CLEAR RIGHT TO OVERTIME COMPENSATION.

The Plaintiffs, in reliance upon existing law, elected to work overtime on the basis of their statutory right to overtime compensation under the FLSA.[6] The Retrospective Amendment denies Plaintiffs their rights to this compensation for overtime previously worked. The Retrospective Amendment creates results much more harsh and oppressive than any other retrospective legislation previously found to be constitutional. The Portal-to-Portal Pay Act retrospectively denied to employees certain compensation which was completely unexpected at the time the hours were "worked" and which constituted a mere windfall.[7] The Coal Mine Health and Safety Act of 1969 imposed liability on employers for prior employees' unforeseen black lung disease. The liability may have been unexpected, but no reliance interests were upset.[8] The Multiemployer Pension Plan Amendments Act of 1980 retrospectively converted

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[6] Defendants may argue, incorrectly, that the Plaintiffs had no voluntary choice to work overtime. The Furnas Affidavit, ¶ 5 (App. A-25), does explain that the range of Rhinebarger's choices in the form of electing to work additional hours may be somewhat limited. This statement is of course consistent with normal employer/employee relationships, where employees are not given total freedom to work unlimited overtime. Furnas does not state, however, that Rhinebarger did not, or could not, have any discretion to work additional hours.

[7] *See Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948), *infra* at 14-15.

[8] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *supra* at 5-9 and *infra* at 16-17.

an employer's liability from contingent to certain, in order to protect the vested pension benefits and the reliance interests of the employees.[9] None of these statutes involved a citizen's intentional and detrimental change in his behavior in reasonable reliance upon existing law. Application of the Retrospective Amendment is harsh and oppressive and thus offends due process.

The facts of the instant case are established by the Affidavits which were filed by Plaintiffs and Defendants. (App. A-21-27). From February 19, 1985 (*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)) to November 13, 1985 (enactment of the Retrospective Amendment),[10] the Plaintiffs, and Defendants, knew that overtime compensation must be paid under the FLSA. Plaintiffs reasonably based their belief upon: (1) a recent U.S. Supreme Court decision (*Garcia*) holding that the states are subject to the overtime compensation requirements of the FLSA; (2) an eleven year old Congressional act (providing FLSA protections to employees of the states); (3) the working time for which Plaintiffs are claiming overtime had historically been considered as "compensable time" and thus Plaintiffs were not receiving a "windfall" for idle time; and, (4) communications and actions of officials of the Indiana State Police Department which continually led Plaintiffs to believe that overtime hours worked would result in overtime compensation.[11]

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[9] *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), *supra* at 8-9 and *infra* at 18-19.

[10] Plaintiffs are only challenging the constitutionality of the Retroactive Amendment insofar as it bars compensation for overtime worked during the period when Plaintiffs *knew* they would be compensated for overtime, and because of such compensation, voluntarily elected to work overtime for the Defendants. Thus, Plaintiffs are only seeking compensation for time worked *after Garcia* (February 19, 1985) and before the Retrospective Amendment (November 13, 1985).

[11] Significantly, the memorandum dated October 19, 1985, from the Indiana State Police Department to all employees (App. A-23), distributed at a point after the filing of this lawsuit, again supported the Plaintiffs' reasonable expectations of overtime compensation.

The Seventh Circuit responded to the claims of the Plaintiffs that their reliance interests had been abrogated by suggesting that a "reliance expectation" may not rise "to the level of a constitutionally protected property interest . . . ." (App. A-4, A-8). This statement is misplaced, as the "property" protected by due process in this setting is the overtime compensation for hours worked, and not the reliance interest in receiving such compensation. Employees clearly have a personal right to claim such compensation under 29 U.S.C. § 216. The Plaintiffs' reliance interest is the critical factor in determining whether the property right can be taken away within the parameters of due process.[12] The cases discussed below all stressed the lack of such a reliance interest in holding that the retrospective legislation at issue there satisfied due process.

A. THE PORTAL-TO-PORTAL PAY ACT CASES DO NOT SUPPORT THE CONSTITUTIONALITY OF THE RETROSPECTIVE AMENDMENT.

The Portal-to-Portal Pay Act, 29 U.S.C. §§ 251-262 (amending the FLSA), and the subsequent cases determining the constitutionality thereof are not precedent for the constitutionality of the Retrospective Amendment, but to the contrary strongly suggest the unconstitutionality thereof. The Portal-to-Portal Pay Act retrospectively eliminated only the unexpected compensation for employees for waiting or idle time that had traditionally been noncompensable but which became com-

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[12] The Seventh Circuit also proposed that the states and local governments had reliance interests upset by *Garcia*, which were then protected by the Retrospective Amendment. (App. A-8) (citing *Kartevold v. Spokane County Fire Protections*, 625 F.Supp. 1553, 1559 (E.D. Wash. 1986)). This proposition is critically flawed. First, *Kartevold* involved claims for overtime worked *before Garcia*, and thus the employer's reliance interest was important in that he may have allowed additional overtime to be worked based upon a belief that there was no required overtime compensation. Second, the record in this case, and the legislative history, provides no support for this proposition.

pensable because of the retrospective effect of a judicial decision. In our case, the Retrospective Amendment denies expected compensation for time worked that had historically been considered as actual work time and for which employees would have expected compensation. This critical distinction between the effect of Portal-to-Portal Pay Act as compared to the effect of the Retrospective Amendment supports Plaintiffs' assertion that the Retrospective Amendment is unconstitutional.

In 1946, this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and two contemporaneous cases, provided a judicial interpretation of the FLSA which concluded that certain waiting time or preliminary activities of coal mine workers and other employees, which activities occurred on a daily basis prior to the start of the employees' work shift, were in fact part of "time worked" under the FLSA and thus compensable as overtime. This pre-work activity, termed "portal-to-portal" time, had never previously been considered by employers or employees as compensable working time for purposes of either straight time compensation under the employees' compensation arrangement, or overtime compensation under the FLSA. The decisions were apparently to have retroactive effect. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 60 (4th Cir. 1948).

This interpretation of the FLSA was a complete surprise to employers, and because of its retroactive effect suddenly presented an unexpected opportunity for a windfall to those employees who had never contemplated being paid at all for the idle "portal-to-portal" time, but who had nevertheless previously "worked" such time on behalf of their employers. Numerous lawsuits were filed to capture the "windfall" in the form of regular and overtime compensation for time that the employees had previously spent "portal-to-portal". The U.S. House of Representatives later made a finding that 1,913 cases had been filed, wherein specific damages of $5,785,204,606 were claimed. This claimed liability was found by Congress to be "in disregard of long-established customs, practices, and

contracts between employers and employees, thereby creating *wholly unexpected liabilities*, immence in amount and retroactive in operation . . . ." *Id.* (emphasis added).

Congress reacted with the Portal-to-Portal Pay Act, which retrospectively eliminated only the *unexpected* liability of employers to compensate employees for the traditionally non-compensable time. Significantly, the Portal-to-Portal Pay Act did not affect claims to compensation for time worked that had historically been considered as actual work time and for which the employees would have expected compensation at the time of working. 29 U.S.C. § 252(a). The Act retrospectively took away a "windfall" from the affected employees. Thus, reasonable expectations of the employees were not upset by application of the Portal-to-Portal Pay Act.

The constitutionality of the Portal-to-Portal Pay Act, as retrospective legislation, was challenged under the Due Process Clause in numerous cases and was upheld. *Seese*, 168 F.2d at 61. Two facts were critical to the finding that the retrospective legislation was constitutional. First, "the claims to portal to portal pay stricken down by the Act were not based on contract, custom, or practice, for such claims were expressly excepted from its provisions." *Id.* at 64. Second, the employees were themselves claiming under a retroactive interpretation of the FLSA. The court in *Seese* described the Portal-to-Portal Pay Act as follows: "As a matter of fact, all that it does is prevent employees from reeping an *unexpected windfall* from an unexpected court decision." *Id.* at 65 (emphasis added).[13]

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[13] The Portal-to-Portal Pay Act cases would therefore only support the constitutionality of the Retrospective Amendment's barring a claim for backpay for overtime hours worked *prior* to this Court's *Garcia* decision, such as those claims asserted in *Kartevold v. Spokane County Fire Protections*, 625 F.Supp. 1553, 1559 (E.D. Wash. 1986). In *Kartevold*, the District Court recognized this exact distinction:

> Given the fact that neither governmental employers nor their employees knew they had any rights or duties under the 1974 FLSA amendments pre-Garcia, and in point of fact had none, it is difficult

(*Footnote continued*)

The Portal-to-Portal Pay Act cases therefore have no application to the issue of the constitutionality of retrospective legislation that defeats reasonable expectations which were based upon a clear liability under existing law. In fact, these cases provide the most persuasive argument that the Retrospective Amendment is unconstitutional, because the Retrospective Amendment takes away relied upon compensation as opposed to a mere windfall.

B. THE UNCONSTITUTIONALITY OF THE RETROSPECTIVE AMENDMENT IS SUPPORTED BY THIS COURT'S DECISION IN *USERY V. TURNER ELKHORN MINING CO.*, WHICH PROVIDES THE PROPER FRAMEWORK FOR DUE PROCESS ANALYSIS OF RETROSPECTIVE LEGISLATION.

As previously discussed, *supra* at 5-9, this Court held in *Usery v. Turner Elkhorn Mining Co.* that due process constraints posed no bar to legislatively imposing liability upon coal mine operators for deaths or disabilities to coal miners due to black lung disease caused by the working conditions in the coal mines, even if their employment terminated prior to the enactment of the legislation. 428 U.S. at 17-18. Specifically, this Court held that the imposition of such retrospective liability was justified as a rational measure of spreading the cost of the disabilities caused by the black lung disease to the coal mine operators and consumers who benefitted from the employees' labor in the coal mines. *Id.*

(Footnote 13 continued)

> to see how anyone could have relied upon the efficacy of those amendments.
>
> . . .
>
> . . . [I]s it fair to change the rules of the game once the bets are down[?] The answer is in the negative if the wager is substantial, the rules initially well-settled, and the change in rules outcome-determinative. The answer is in the affirmative if no one knew there was even a bet on the table.

, *Id.* at 1563.

While this Court's decision in *Turner Elkhorn Mining* is crucial in defining the proper scope of due process analysis, the finding that the black lung provisions of the Coal Mine Health and Safety Act of 1969 were constitutional does not support the constitutionality of the Retrospective Amendment. In *Turner Elkhorn Mining*, retrospective liability was placed upon the parties who benefitted from the work in the coal mines which ultimately resulted in black lung disease. The employers also did *not* frame their actions in reliance upon existing law. Conversely, the Retrospective Amendment imposes the burden upon the Plaintiffs who had elected to work for the Defendants. Thus, Defendants benefitted by the fact that Plaintiffs performed additional services for them at a time when *Defendants knew* they would have to pay for such time, and intended to do so, until Congress *provided* the windfall to the Defendants. It is clear that Plaintiffs' voluntary actions were taken in reliance upon existing law. Therefore, *Turner Elkhorn Mining* would suggest that application of the Retrospective Amendment is irrational and, thus, constitutionally impermissible.[14]

[14] The arguments presented by Plaintiffs are further reinforced by this Court's reluctance to overrule *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935). In *Alton*, this Court found the Railroad Retirement Act of 1934 to be unconstitutional. Specifically, the *Alton* Court invalidated a provision of the Act providing that employer-financed pensions must include former employees who had been employed within one year of the enactment of the legislation. The employers successfully argued that application of such a provision was arbitrary and irrational. Significantly, the *Alton* Court did not find that Congress did not have a rational purpose in enacting the retrospective legislation at issue. Rather, *application* of the legislation was held to be arbitrary and irrational. *Id.* at 348-49. Likewise, Plaintiffs assert that the Retrospective Amendment is unconstitutional, in that application of the legislation created a harsh and oppressive effect upon Plaintiffs who had voluntarily acted in reliance upon existing law. The decision of the Seventh Circuit here cannot be reconciled with *Alton*.

C. THE PENSION PLAN AMENDMENTS UPHELD IN *R.A. GRAY* ARE CRITICALLY DIFFERENT THAN THE RETROSPECTIVE AMENDMENT.

As previously discussed, *infra* at 5-10, the case of *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), provides this Court's most recent due process analysis of retrospective legislation. In *R.A. Gray*, this Court held that the Multiemployer Pension Plan Amendments Act (hereinafter, the "MPPAA") was constitutional. Prior to the MPPAA, an employer who withdrew from a multiemployer pension plan was subject to liability contingent upon either a later termination of the plan within five years or a shortfall in assets to pay vested benefits to covered employees. The MPPAA caused this liability to be certain and required withdrawing employers to make regular payments. The MPPAA was retrospectively applicable to employers who withdrew prior to the enactment thereof. This Court found a rational Congressional purpose of utilizing retrospective application of the MPPAA to prevent employers from taking advantage of a lengthy legislative process and withdrawing from the multiemployer plans while Congress debated necessary revisions. *Id.* at 731. The effect of the application of the MPPAA was merely to require a withdrawing employer to compensate a pension plan for benefits that had already vested with the employees at the time of the employer's withdrawal. *Id.* at 719. Significantly, the retrospective effective date was the date that the legislation was recommended to Congress. *Id.* at 723. Thus, the effect of the retrospective effective date was not to impose liability on unsuspecting employers, but, rather, to convert from contingent to certain employers' liability who withdrew from the plan while the legislation was pending and, presumably, while the employers were aware of the pending legislation's existence.

The case of *R.A. Gray* does not support the constitutionality of the Retrospective Amendment. Unlike *R.A. Gray*, the Retrospective Amendment punishes Plaintiffs who actually relied

upon the FLSA as it existed at the time the work was performed, and who expected to be compensated thereunder for such work. The *R.A. Gray* employers had no such reliance.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Appendix

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 4, 1988

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. KENNETH R. RIPPLE, Circuit Judge
HON. HUBERT L. WILL, Senior District Judge*

JAMES A. RHINEBARGER, et al., *Plaintiffs-Appellants,*	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 87-1738 vs.	
ROBERT D. ORR, Governor, State of Indiana, et al., *Defendants-Appellees.*	) No. 85-C-1497 WILLIAM E. STECKLER, Judge.

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* The Honorable Hubert L. Will, Senior Judge of the United States Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1738

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Personnel Department; JOHN T. SHETTLE, Superintendent, Indiana State Police Department; STATE OF INDIANA; and, INDIANA STATE POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP85-1497C—**William E. Steckler,** *Judge.*

ARGUED DECEMBER 3, 1987—DECIDED FEBRUARY 4, 1988

Before BAUER, *Chief Judge,* RIPPLE, *Circuit Judge,* and WILL, *Senior District Judge.**

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* The Honorable Hubert L. Will, Senior Judge of the United States Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

BAUER, *Chief Judge.* On February 19, 1985, the United States Supreme Court addressed for the third time the applicability of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216, to the states. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985). In round three, the Court held that the commerce clause empowers Congress to enforce the provisions of the FLSA against the states, thus overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which, in turn, had previously overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). On October 15, 1985, the plaintiffs, Indiana state police officers, filed a complaint seeking to recover overtime compensation pursuant to the FLSA, 29 U.S.C. § 207. One month later, Congress amended the FLSA to read: "No State . . . shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation . . . of such Act occurring before April 15, 1986 . . . ." Pub. L. No. 99-150, *reprinted in* 1985 U.S. CODE CONG. & AD. NEWS, 99 Stat. 787. The district court found that this amendment barred the plaintiffs' claim and that the amendment passed constitutional muster. Plaintiffs appeal and we affirm.

Plaintiffs seek to recover compensation for their overtime work between the time of the *Garcia* opinion up until April 15, 1986. It is undisputed that during this period, plaintiffs worked in excess of forty hours per week without receiving overtime compensation under the FLSA. Plaintiffs claim that they are entitled to overtime pay for work during this period because they relied on the Supreme Court's opinion in *Garcia* and began working overtime with the reasonable expectation of receiving compensation for this work as required by the FLSA.[1] They argue further that the 1985 FLSA Amendment is unconstitutional because it "completely upset" this reliance in violation of the due process clause. U.S. Const. Amend. V.

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[1] Plaintiffs readily concede that they are not entitled to any compensation for overtime work performed before the Supreme Court decided *Garcia*.

Although we doubt whether plaintiffs' reliance on *Garcia* rises to the level of a constitutionally protected property interest, we need not decide this thorny issue in order to resolve this case. Rather, following the precedent of the Supreme Court, we conclude that the 1985 FLSA Amendment is constitutional because it enacts a rational legislative purpose in a manner that is neither harsh nor oppressive. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984).

It is well established that congressional legislation "adjusting the burdens and benefits of economic life" are presumed constitutional and that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted). This strong deference to Congress's national economic policy applies as well to retroactive legislation as long as "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, ..." *R. A. Gray*, 467 U.S. at 729. This is so even if the legislation readjusting rights and burdens "upsets otherwise settled expectations." *Id.* at 729 (citing *Turner Elkhorn*, 428 U.S. at 16). This does not mean, however, that "what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 16-17. Nevertheless, congressional legislation meets the test of due process if "the retroactive application of the legislation is itself justified by a rational legislative purpose." *R. A. Gray*, 467 U.S. at 730.[2]

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[2] Plaintiffs invite us to engage in a four-prong inquiry developed by this Circuit in *Nachman v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 354 (1980). We decline to do so. In *R. A. Gray*, the Supreme Court rejected the *Nachman* test for reviewing the constitutional-

(Footnote continued on following page)

Plaintiffs have failed to meet their burden of showing that the 1985 FLSA Amendment is irrational. Plaintiffs make little effort to argue that the 1985 Amendment does not fulfill a legitimate and rational legislative purpose. The Senate Report to the Amendment explains the purpose of the retroactive provisions: "The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities." S. Rep. No. 99-159 at 15, 99th Cong., 1st Sess. 2, *reprinted in*, 1985 U.S. CODE CONG. & AD. NEWS 663.[3] Thus we

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[2] *continued*
ity of retroactive legislation under the due process clause, although it refused to decide whether the factors discussed in *Nachman* may be relevant in determining whether retroactive legislation is rational. 467 U.S. at 727 n.6. The Supreme Court concluded that the *Nachman* test was premised on a contract clause analysis rather than on a due process one. *Accord, Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1262-66 (7th Cir. 1983) (rejecting the *Nachman* contract clause analysis approach in favor of the *Turner Elkhorn* due process approach). To the extent we believe these *Nachman* factors are still relevant to this analysis, we shall discuss them indirectly below.

[3] The Senate Report discussed this purpose in detail:

> In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into socially desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisor labor force; . . . but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments. The rights and protections accorded to employees of the federal government and the private sector also are extended to employees of states and their political subdivisions.
>
> At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions

(Footnote continued on following page)

conclude that Congress acted for the rational purpose of protecting the fiscal integrity of the states and their political subdivisions.

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[3] *continued*

be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.

The Committee recognizes that the financial costs of coming into compliance with the FLSA—*particularly the overtime provisions of section 7*—are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

Jurisdictions which had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet FLSA standards immediately under *Garcia*. Although many jurisdictions commendably and successfully have undertaken to do so, others have expressed an urgent need for leadtime in which to reorder their budgetary priorities while maintaining fiscal stability. *As the Committee did under its 1974 amendments, it has again allowed for lead-time for state and local governments to comply with the FLSA requirements.*

S. REP. No. 99-159 at 7-8, 99th Cong., 1st Sess. 2, *reprinted in* U.S. CODE CONG. & AD. NEWS, 655-56 (1985) (emphasis added).

Plaintiffs argue that the Amendment is irrational because it is "particularly harsh and oppressive" and cite *R. A. Gray*, 467 U.S. at 733 and *Welch v. Henry*, 305 U.S. 134, 147 (1938). In *R. A. Gray*, however, the Court concluded that this "standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*." 467 U.S. at 733. Following the Supreme Court's lead, we also treat these as the same standard. Most legislation adversely affects some while benefitting others; laws are "harsh and oppressive" in a constitutional sense only when Congress enacts them with an irrational or arbitrary purpose.

The *Garcia* decision posed a serious dilemma for Congress: how to achieve the desired results of the FLSA without financially overburdening the states. Congress enacted the FSLA to guarantee certain rights and benefits to all workers, including overtime compensation. In *Wirtz*, the Supreme Court decided that Congress could enforce the FLSA against the states; this decision was overruled in *National League of Cities*, which held that the FLSA amendments were unconstitutional to the extent that they interferred with the traditional governmental functions of the states. Ten years later, the Supreme Court reversed itself again, paving the way for state employees to become eligible for certain benefits under the FLSA. Although anxious to provide these benefits, Congress also feared the drastic financial impact *Garcia* might have on the states. Consequently, Congress provided a grace period for the states and local governments in which measures could be taken to enforce the inactive FLSA without jeopardizing their economic viability. Congress chose to "spread the costs," *Turner Elkhorn*, 428 U.S. at 18, of the implementation of the dormant FLSA among the various employees across the nation rather than placing the burden on the treasuries of the states and their taxpayers. Congress made this difficult, but rational, choice after hearing extensive and heated testimony from

all interested parties.[4] It is not this court's role to evaluate Congress's wisdom in deciding to place the burden of *Garcia* on a small percentage of employees for a short period of time instead of threatening the financial stability of states and local governments. *See Turner Elkhorn*, 428 U.S. at 18-19.

Plaintiffs make a great deal out of their "reliance expectations." Although we do not address whether these "expectations" rise to the level of a constitutionally protected property interest, we do note that the states and local governments also had certain reliance interests upset by *Garcia*. Many public officials negotiated contracts with their employees in reasonable reliance on *National League of Cities* and Congress has sought to cushion them, "their taxpayers and . . . the system at large" from the harsh result of *Garcia*. *Kartevold v. Spokane County Fire Protections*, 625 F. Supp. 1553, 1559 (E.D. Wash. 1986).

The due process rationality test does not require the courts to second-guess the desirability or value of legislative amendments; this is a distinctively legislative function. Plaintiffs ask us to reassess the judgment of Congress in adjusting the burdens and costs of the FLSA. The due process clause, however, only requires us to review the rationality of the legislation's purpose. Congress enacted the 1985 FLSA Amendment, knowing full well that it would prevent some state employees from receiving overtime compensation for a short period of time, in order to allow the states to maintain fiscal stability. Given this rational, legitimate purpose, we conclude that the plaintiffs have failed to show that the 1985 FLSA Amendment allowing states a grace period after *Garcia* is irrational, harsh, or oppressive. We hold, there-

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[4] "The legislative history reveals that the amendments . . . represented an accommodation between the interests of governmental employees and their employers." *Blanton v. City of Murfreesboro*, 658 F. Supp. 1540, 1541 (M.D. Tenn. 1987).

fore, that this economic legislation is constitutional under the due process clause.

The judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinios 60604

March 8, 1988.

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. HUBERT L. WILL, Senior District Judge*

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,	)
Plaintiffs-Appellants,	) Appeal from the United States District Court for the Southern District of
No. 87-1738 vs.	) Indiana, Indianapolis Division.
ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Personnel Department; JOHN T. SHETTLE, Superintendent, Indiana State Police Department; STATE OF INDIANA; and INDIANA STATE POLICE DEPARTMENT,	) No. IP85-1497C William E. Steckler, *Judge.*
Defendants-Appellees.	)

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause

* The Honorable Hubert L. Will, Senior Judge of the United States Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

by Plaintiffs-Appellants James A. Rhinebarger, Michael L. Pershing, J. Keith Gill, and Steven W. Romack, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. RHINEBARGER, et al.	)	
	)	
v.	)	IP 85-1497-C
	)	
ROBERT D. ORR, Governor State of Indiana, et al.	)	

JUDGMENT

Pursuant to the Court's order granting the defendants' motion for summary judgment, and the Court on this date having entered its findings of fact and conclusions of law,

IT IS NOW ORDERED, ADJUDGED and DECREED that judgment be entered for the defendants, and that the plaintiffs take nothing by their complaint.

Dated this 7th day of April, 1987.

/s/ William E. Steckler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. RHINEBARGER, et al.	)	
	)	
v.	)	IP 85-1497-C
	)	
ROBERT D. ORR, Governor, State of Indiana, et al.	)	

ORDER OF APRIL 7th, 1987

This matter is before the Court upon cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. This rule states, in part, that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The Court, having examined the motions, the memorandums of law and the supporting affidavits, now finds that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law. Therefore the Court must grant the defendants' motion for summary judgment and deny the plaintiffs' motion for partial summary judgment. The Court now enters the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiffs are employees of the Indiana State Police Department and the State of Indiana.

2. The Fair Labor Standards Act ("FLSA") states that employers may not employ certain employees "for a work-week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified

at a rate not less than one and one-half (1 1/2) times the regular rate at which he is employed." 29 U.S.C. § 207.

3. The Fair Labor Standards Amendments of 1985 ("Amendments") provide that no state or political subdivision of a state shall be liable under the FLSA for minimum pay or overtime violations occurring before April 15, 1986. Pub. L. No. 99-150, *reprinted in* 1985 U.S. Code Cong. & Ad. News, 99 Stat. 787.

4. Prior to April 15, 1986, members of the plaintiff class were employed for workweeks longer than forty hours. However, these members of the plaintiff class did not receive overtime compensation at the rate of one and one-half (1 1/2) times their regular pay for the excess hours they worked.

Conclusions of Law

Based on the foregoing findings of fact, the Court now makes the following conclusions of law.

1. The plaintiffs' action is barred by the 1985 Amendments to the FLSA. On February 19, 1985, the Supreme Court decided *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and held that the minimum pay and overtime provisions of the FLSA apply to the states, even when they act "in areas of traditional governmental functions," such as police work. Shortly after the *Garcia* decision Congress passed the 1985 Amendments to the FLSA which "deferred application of the overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments [could] make necessary adjustments in their work practices, staffing patterns and fiscal priorities." *S. Rep. No.* 99-159 at 15 *reprinted in* 1985 U.S. Code Cong. & Ad. News 663.

2. The 1985 Amendments to the FLSA apply retroactively to relieve the state from liability for unpaid overtime occurring before the Amendments became effective and after the *Garcia* decision. *See Kartevold v. Spokane County Fire Protection*

District, 625 F. Supp. 1553, 1559-63 (E.D. Wash. 1986); *Wong v. City of New York, Human Resources Administration*, 641 F. Supp. 588, 591, n. 2 (E.D. Mich. 1986).

3. The 1985 Amendments to the FLSA are not unconstitutional.[1] The Amendments do not deprive the plaintiffs of a property interest without due process of law. The plaintiffs did not gain a vested property interest in overtime benefits after the *Garcia* decision and before the Amendments became effective. A property interest in a statutory benefit has been limited to cases where individuals had enjoyed benefits under the statute. *See O'Quinn v. Chambers County, Texas*, 636 F. Supp. 1388, 1390 (S.D. Tex. 1986). Prior to *Garcia* the plaintiffs worked outside of the FSLA's (sic.) requirements without any contractual or statutory right to overtime. *Garcia* may have created hopes that the plaintiffs would receive overtime, but it did not create any vested property interests.

Even if the plaintiffs did have a property interest in overtime benefits after the decision in *Garcia*, Congress acted rationally when enacting the Amendments, thereby giving the plaintiffs all the process that they were due. *Id.* at 1390. Congress, in deferring the application of the overtime provisions until April 15, 1986, acted to protect the fiscal integrity of the states and their political subdivisions. This is a rational and legitimate purpose.

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[1] Because the Court finds the Amendments constitutional it has not certified to the Attorney General of the United States the fact that the plaintiffs have challenged the constitutionality of the Amendments. Fed. R. Civ. P. 24(c) and 28 U.S.C. § 2403(a) require notice to the Attorney General and an opportunity to intervene when the constitutionality of an act of Congress affecting the public interest is questioned. However, a failure to give the notice does not deprive the court of jurisdiction to decide the case. *See* 7C C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE § 1915 (1986). The Court holds that it meets the requirements of Rule 24(c) and § 2403(a) by certifying a copy of this order to the Attorney General and by entertaining his motion for rehearing if he believes that intervention is required. *See O'Quinn v. Chambers County, Texas*, 636 F. Supp. 1388, 1390 n. 1 (S.D. Tex. 1986).

4. There is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law.

Accordingly, by reason of all of the foregoing, the Court hereby

GRANTS the defendants' motion for summary judgment and

DENIES the plaintiffs' motion for partial summary judgment.

IT IS SO ORDERED.

Dated this 7th day of April, 1987.

/s/ William E. Steckler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Cause No. IP85-1497C
ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Personnel Department; JOHN T. SHETTLE, Superintendent, Indiana State Police Department; STATE OF INDIANA; and, INDIANA STATE POLICE DEPARTMENT,	)	
Defendants.	)	

NOTICE TO CLERK OF ATTACK UPON CONSTITUTIONALITY OF ACT OF CONGRESS

Comes now the Plaintiffs, by counsel, and pursuant to 28 U.S.C. § 2403, notifies the Clerk of this Court that an Act of Congress, specifically the "Fair Labor Standards Amendments of 1985", Public Law 99-150, 99th Congress, 99 Stat. 787 (1985), has been challenged on constitutional grounds by Plaintiffs in this cause in their "Plaintiffs' Response to Defendants' Motion to Dismiss" filed previously with this Court, and will be further challenged on constitutional grounds in Plaintiffs' Motion for Summary Judgment which will be filed shortly

hereafter with this Court. Neither the United States, nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party. Plaintiffs therefore request the Clerk of this Court to certify to the Attorney General of the United States that the constitutionality of an Act of Congress is being questioned in this matter. A proposed form for this certification is attached hereto.

Respectfully submitted,

HENDERSON, DAILY, WITHROW & DEVOE

By: /s/ B. Keith Shake

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Cause No. IP85-1497C
ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Personnel Department; JOHN T. SHETTLE, Superintendent, Indiana State Police Department; STATE OF INDIANA; and, INDIANA STATE POLICE DEPARTMENT,	)	
Defendants.	)	

CERTIFICATE TO THE ATTORNEY GENERAL OF THE UNITED STATES OF ATTACK UPON CONSTITUTIONALITY OF ACT OF CONGRESS

The District Court of the United States, Southern District of Indiana, Indianapolis Division, hereby certifies to the Attorney General of the United States that the constitutionality of an Act of Congress, the "Fair Labor Standards Amendments of 1985", Public Law 99-150, 99th Congress, 99 Stat. 787 (1985), is drawn into question in the case of *James A. Rhinebarger, et al. v. Robert D. Orr, et al.*, Cause No. IP85-1497C, to which neither the United States, nor any

agency thereof, nor any officer or employee thereof, as such officer or employee, is a party.

/s/ John A. O'Neal
Clerk, United States District Court
Southern District of Indiana
Indianapolis Division

February 28, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Cause No. IP85-1497C
ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Personnel Department; JOHN T. SHETTLE, Superintendent, Indiana State Police Department; STATE OF INDIANA; and, INDIANA STATE POLICE DEPARTMENT,	)	
Defendants.	)	

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now Plaintiff James A. Rhinebarger, being duly sworn and upon my oath, and hereby states the following:

1. I am an employee of the Indiana State Police Department in the rank of Senior Trooper/Investigator and have been a full-time regular employee of the Indiana State Police Department since April 1, 1972. I have personal knowledge of the facts contained herein.

2. Immediately after the decision of the U.S. Supreme

Court in *Garcia v. San Antonio Metropolitan Transit Authority* was announced February 19, 1985, I and other employees of the Indiana State Police Department became aware of its impact upon the compensation we were entitled to for hours worked.

3. Immediately after the decision in *Garcia*, I became aware and was informed of the Fair Labor Standards Act and its requirement for compensation at the rate of time and one-half for all overtime hours worked.

4. I, and other employees of the Indiana State Police Department, sincerely believed in and relied upon the provisions of the Fair Labor Standards Act which would entitle us to overtime compensation at the rate of time and one-half.

5. Officials of the Indiana State Police Department lead me, and other employees of the Indiana State Police Department, to believe and rely upon the provisions of the Fair Labor Standards Act and that we would be entitled to overtime compensation at the rate of time and one-half. Attached hereto is a true and accurate copy of a memorandum distributed by the Indiana State Police Department to all police employees.

6. I, and other employees of the Indiana State Police Department, relied upon the provisions of the Fair Labor Standards Act, and communications and actions of officials of the Indiana State Police Department, in deciding to work additional hours in our employ with the Indiana State Police Department. These additional hours worked were of a type historically considered as "working time" by the Department.

7. I, and other employees of the Indiana State Police Department; relying upon our right to overtime compensation, elected on numerous occasions to work hours in excess of that normally required of us, in the good faith belief that we would be compensated for such work. Despite my right to such overtime compensation, to date I have not been paid for these extra hours worked.

Further your affiant saith not.

I AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

/s/ James A. Rhinebarger

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ALL STATIONS

IMPLEMENTATION OF THE FAIR LABOR STANDARDS ACT — FLSA — HAS LEFT MANY UNANSWERED ISSUES AMONG DEPARTMENT PERSONNEL, INCLUDING THAT OF OVERTIME PAY FOR THAT PERIOD OF TIME BETWEEN FIRST APPLICATION OF THE ACT TO THE STATES AND OCTOBER 6, 1985 WHEN THE DEPARTMENT INITIATED REGULAR OVERTIME PAYMENT.

THIS PERIOD OF TIME HAS NOT BEEN FORGOTTEN. THE DEPARTMENT IS PRESENTLY WRITING A COMPUTER PROGRAM TO RETRIEVE AND CALCULATE OVERTIME HOURS FOR ELIGIBLE EMPLOYEES, AND WILL BE SUBMITTING THE INFORMATION TO THE PROPER STATE OFFICIALS ONCE COMPLETED. WE HAVE BEEN INFORMED THAT SOME EMPLOYEES HAVE ELECTED NOT TO WAIT FOR THIS PROCESS TO BE COMPLETED AND HAVE FILED LAWSUIT CLAIMS FOR OVERTIME COMPENSATION, WHICH THEY ARE LEGALLY ENTITLED TO DO.

IN LIGHT OF SUCH ACTION, SUPERVISORY PERSONNEL ARE INSTRUCTED NOT TO MAKE ANY THREATENING COMMUNICATION, EITHER IMPLICITLY OR EXPLICITLY, AGAINST SUCH EMPLOYEES FOR EXERCISING THEIR FEDERAL RIGHT UNDER FLSA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Cause No. IP85-1497C
ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Personnel Department; JOHN T. SHETTLE, Superintendent, Indiana State Police Department; STATE OF INDIANA; and, INDIANA STATE POLICE DEPARTMENT,	)	
Defendants.	)	

AFFIDAVIT IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now Larry D. Furnas, an employee of the Indiana State Police Department, and first being duly sworn upon his oath, hereby states the following:

1. That he is an employee of the Indiana State Police Department in the rank of Lieutenant Colonel and the Deputy Superintendent for Administration and Legal Affairs. He has been a full-time employee of the Indiana State Police Department

since May 16, 1964, and has personal knowledge of the facts contained herein.

2. That practices and procedures followed by the Indiana State Police Department in scheduling of hours worked remained virtually unchanged after *Garcia v. San Antonio Metropolitan Transit Authority* from those practices and procedures exercised prior to the decision in this case.

3. That the Indiana State Police Department operates today in a semi-military fashion and has always done so. That such a form of management is followed for reasons of public safety and well-being and has, in the past, been followed without particular attention to hours worked.

4. That the Indiana State Police Department has incorporated into its regulations performance standards applicable to all police employees which require them to "give the State of Indiana an honest day's work for a day's pay recognizing and accepting the fact that the Department will not tolerate laziness *and that he will often be required to work long hours to accomplish his mission.*" (emphasis added).

5. That decisions to work additional hours beyond those regularly scheduled are not made by the employees, except in specifically funded federal projects or state workback days, but are required by the duties of the particular officer, usually in response to an emergency situation.

6. That all officers of the Indiana State Police Department are, according to Indiana Code 10-1-1-3, salaried employees and as such, any theory of reliance upon being compensated for additional hours worked was not in a good faith belief until such time as existing rules and regulations were modified.

7. That no communication or correspondence was ever disseminated by the Indiana State Police Department indicating that employees would be compensated for additional hours worked until after new rules were implemented in October of 1985.

8. That an attached copy of a teletype to the pleadings

previously filed by Plaintiffs in this action under date of October 17, 1985, was authorized by this affiant, but such teletype was written in response to the attached letter from Plaintiffs and was primarily directed toward the avoidance of retaliatory action by supervisory employees. That no intent was meant to be conveyed that compensation would occur for the period prior to October 6, 1985, but merely that such time period was being looked into for the purpose of submitting such hours to the proper state officials for their action.

Further, affiant saith not.

/s/ Larry D. Furnas
Lieutenant Colonel
Indiana State Police
Department

HENDERSON, DAILY, WITHROW & DEVOE
Attorneys at Law
2450 One Indiana Square
Indianapolis, Indiana 46204
317-639-4121

October 16, 1984

Mr. John T. Shettle
Superintendent
Indiana State Police Department
State Office Building
Indianapolis, Indiana 46204

Dear Superintendent Shettle:

As you know, we represent the class of plaintiffs ("Class") in a lawsuit pending in U.S. District Court (Cause No. 85-1497C) ("Lawsuit"), in which Lawsuit claims are asserted for overtime compensation for the period from February 19, 1985 to October 6, 1985. We have been informed of several specific instances of threats by supervisory personnel directed at potential Class members regarding their participation in any overtime compensation claim. We are advised that there have been at least

implicit, if not explicit, threats of retaliation against employees if they participate in the Class.

I am sure you are aware that any such incidents are violations of 29 U.S.C. § 215(a)(3) (FLSA § 15(a)(3)) and carry very severe penalties. To prevent these unfortunate incidents in the future we request that supervisory personnel be informed that any threatening communication, whether implicit or explicit, with current or potential Class members regarding the Lawsuit or other FLSA claims is a violation of the employees' federal rights. We also ask that an announcement be made immediately that all employees are free to assert their rights under the Fair Labor Standards Act, without any fear of retaliation by Department personnel.

Such measures should lessen the risks of such incidents in the future.

Sincerely,

/s/ Keith Shake

Supreme Court, U.S.
FILED
AUG 4 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

NO. 87-2014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Police Personnel Department; State of Indiana; and, INDIANA STATE POLICE DEPARTMENT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the 1985 Amendments to the Fair Labor Standards Act, Pub. L. No. 99-150, are unconstitutional.

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NO. 87-2014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES A. RHINEBARGER, MICHAEL L. PERSHING, J. KEITH GILL, and STEVEN W. ROMACK, On behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. ORR, Governor, State of Indiana; THOMAS A. BEASLEY, Director of Indiana State Police Personnel Department; State of Indiana; and, INDIANA STATE POLICE DEPARTMENT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Robert D. Orr, Governor of Indiana; Thomas Beasley, Director of State Personnel; the State of Indiana; and the Indiana State Police, respectfully pray this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered March 8, 1988 in *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988).

STATUTORY PROVISIONS INVOLVED

Petitioners correctly cite the only statutory provision applicable to this case, the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150 § 2(c)(1), 99 Stat. 788, 29 U.S.C. § 216, which provides:

> No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Codes of Federal Regulations.

STATEMENT OF THE CASE

Petitioners, a group of Indiana State Police officers, filed this action seeking payment for allegedly compensable overtime. Petitioners sought summary judgment on the issue of liability. Respondents replied with their own motion for summary judgment. The District Court entered judgment for Respondents. See *Rhinebarger v. Orr*, 657 F.Supp. 1113 (S.D. Ind. 1987). On appeal the Seventh Circuit affirmed. See *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988). Both courts found the Fair Labor Standards Act Amendments of 1985 constitutional and dispositive.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The 1985 FLSA Amendments Are Constitutional

This Court's reversal of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976) that occurred with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528,

105 S.Ct. 1005 (1985) is at the center of this litigation. This revived application of the FLSA, 29 U.S.C. § 201 *et seq.*, to public employment obviously caught state and municipal employers by surprise, and created the potential for massive liability overnight.

In direct response, Congress enacted a set of amendments to the FLSA which modified applicability of the overtime provisions to certain types of employment, and, of direct impact to the case at bar, a "grace period" for implementation. See Pub. L. No. 99-150 § 2(c)(1), 99 Stat. 788. Stated succinctly, the FLSA would not be applicable to Indiana State Troopers until April 15, 1986.

The Seventh Circuit correctly applied *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984) and found the enactment constitutional. For purposes of due process under the Fifth Amendment, it is necessary to show simply that the congressional enactment is "justified by a rational legislative purpose", *R.A. Gray*, 104 S.Ct. at 2718. This Court has traditionally been reluctant to overturn retroactive statutes "confined to short and limited periods required by the practicalities of producing national legislation", *R.A. Gray*, 104 S.Ct. at 2719, quoting *United States v. Darusmont*, 449 U.S. 292, 296-297, 101 S.Ct. 549, 551-552 (1981).[1]

It is nearly impossible to conceive a more rational congressional purpose than the legislative response sparked by this Court's latest reversal on FLSA application to state employment. A brief grace period normally precedes full application of statutes.

Indeed, the congressional response to *Garcia* followed the precedent established with the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq*. Those amendments to the FLSA, enacted specifi-

[1] The period covered by this case is even narrower than the grace period permitted by the 1985 FLSA amendments. The complaint in this action sought damages for a period beginning February 19, 1985 and ending October 6, 1985. Respondents were able to modify their employment system some six (6) months prior to the congressional deadline.

cally in response to surprising judicial holdings and also retrospectively applied to accrued "liability", were uniformly found to be constitutional. See *Steiner v. Mitchell*, 350 U.S. 247, 76 S.Ct. 330 (1956); *Busch v. Wright Aeronautical Corp.*, 174 F.2d 322 (6th Cir. 1949); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2nd Cir. 1948), certiorari denied, 335 U.S. 887; *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317 (6th Cir. 1948); and *Manosky v. Bethlehem-Hingham Shipyard*, 177 F.2d 529 (1st Cir. 1949).

Both the Seventh Circuit and the District Court, following developing caselaw, have correctly determined that the 1985 Amendments to the FLSA are constitutional. See *Kartevold v. Spokane County Fire Protection*, 625 F. Supp. 1553 (E.D. Wash. 1986); *Wong v. City of New York, Human Resources Administration*, 641 F.Supp. 588, 591 fn 2 (S.D. N.Y. 1986); and *O'Quinn v. Chambers County, Texas*, 636 F.Supp. 1388 (S.D. Texas 1986).

II.

Petitioners Cannot Convert This Legal Issue Into A Factual One.

Petitioners attempt to raise a factual claim of sufficient merit to upend the constitutionality of the 1985 FLSA Amendments. In support of this theory Petitioners submitted an affidavit of the named plaintiff (Petition, Appendix p. 21). In addition to serious questions as whether the intentions of a single individual conclusively establishes anything about other members of the class, or even raises an reference, it is apparent that Officer Rhinebarger's claim that he and his fellow officers arose the day after *Garcia* and chose to work overtime in sincere reliance on rights that were instantly afforded by the FLSA is patently absurd. As the affidavit of Colonel, now acting Superintendent Furnas (Petition, Appendix p. 24-26) indicates, the Indiana State Police operates on a semi-military model in a manner similar to most law enforcement agencies with, prior to *Garcia*, salaried officers who worked "overtime" at the direc-

tion of their superiors or in response to emergency situations. It borders on pure fantasy to assume that the "overtime" worked by Indiana State Troopers contained a substantial "voluntary" component which formed the basis for meaningful "reliance". Petitioners' claim also conjures up the silly and incorrect image of Indiana Troopers who return fire, give chase, or render assistance to accident or crime victims on occasions which unfortunately occur near shift changes, only as a result of a conscious and sincere reliance on getting paid time-and-a-half.[2]

This case was resolved by the District Court on cross motions for summary judgment. F.R.C.P. 56. It is apparent that summary judgment can be entered where a non-moving party has not buttressed his position with plausible, probative evidence.[3] Directed verdict practice generally mirrors the current summary judgment test. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 at 2510 (1986). Summary judgment should be granted if the pretrial evidence "is merely colorable" or "is not significantly probative". *Id.* 106 S.Ct. at 2511.

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[2] The Rhinebarger affidavit also makes reference to a teletype message sent out to the various police posts. (Petition, Appendix p. 22). This message (Petition, Appendix p. 23) was issued on October 17, 1985 in prompt response to Petitioners' letter of October 16, 1985 (Petition, Appendix p. 26-27) warning of possible threats and retaliation for filing the suit. Petitioners offer no explanation for how an October 17, 1985 memo supports "reliance" or "reasonable expectations" in a case where Petitioners seek damages for a period ending eleven days before Rhinebarger or any trooper could have received the memo.

[3] This Court has indicated in *Matsushita Electric Industrial Co. v. Zenith Radio Cor.*, 475 U.S. 574, 106 S.Ct. 1348 (1986):

"It follows from these settled principles that if the factual context renders respondents' [the motion's opponents'] claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 106 S.Ct. at 1356.

Petitioners' feeble efforts to create a significant factual issue must fail. Plaintiffs' transparent evidence offers woefully insufficient grounds to engraft a fact-sensitive test on consideration of the constitutionality of the 1985 FLSA Amendments, a statutory series born of the necessity of dealing with this Court's latest FLSA reversal.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

William E. Daily
Chief Counsel

David Michael Wallman
Section Chief
Federal Litigation